STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Smolenski, P.J., and Neff and White, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

BENJAMIN A. PHILLIPS,

Defendant-Appellant.
_____/

Supreme Court No. 122021

Court of Appeals No. 230897

Lower Court No. 99-009754 FY

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DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court by bench trial, and a Judgment of Sentence was entered on September 18, 2000. A Claim of Appeal was filed on November 9, 2000 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated October 6, 2000, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1), MCL 770.3, MCR 7.203(A), MCR 7.204(A)(2). This Court now had jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. WHERE ASSAULT WITH INTENT TO COMMIT GREAT BODILY HARM IS NOT A NECESSARILY INCLUDED LESSER OFFENSE OR A COGNATE LESSER OFFENSE OF THE CHARGED OFFENSE OF FIRST-DEGREE CRIMINAL SEXUAL CONDUCT INVOLVING PERSONAL INJURY, WAS THE TRIAL COURT WITHOUT AUTHORITY TO RETURN THIS VERDICT IN DEFENDANT'S BENCH TRIAL? WAS DEFENDANT DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO NOTICE OF THE CHARGE AGAINST HIM AND AN OPPORTUNITY TO DEFEND AGAINST THE CHARGE, WHERE THE TRIAL JUDGE CONSTRUCTIVELY AMENDED THE INFORMATION DURING ITS FINDINGS OF FACT AND LAW AND CONVICTED DEFENDANT OF ASSAULT WITH INTENT TO COMMIT GREAT BODILY HARM?

Trial Court made no answer.

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. WAS DEFENDANT DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

Trial Court made no answer.

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant BENJAMIN PHILLIPS was charged with two counts of first-degree criminal sexual conduct (personal injury), MCL 750.520b(1)(f). He was convicted of assault with intent to commit great bodily harm, MCL 750.84, after a bench trial in the Wayne County Circuit Court, the Honorable Diane Marie Hathaway presiding. On September 18, 2000, Mr. Phillips was sentenced to five years probation, with six months in the county jail.

The instant offense allegedly involved Mr. Phillips and his 17-year-old stepdaughter, Jennifer Wall. The prosecution alleged that Mr. Phillips sexually assaulted Ms. Wall on August 15, 1999 about 1:30 p.m. at their home in Belleville. The defense maintained that Ms. Wall was a very troubled teenager who made up the allegations in an effort to get her stepfather out of the house. The trial court acquitted Mr. Phillips of the first-degree criminal sexual conduct charges, but convicted him of assault with intent to commit great bodily harm.

Jennifer Wall testified that she was seventeen at the time of the alleged incident (37a). She testified that on August 15, 1999 about 1:30 p.m., she was sleeping in the guest bedroom of the house when Ben Phillips entered the bedroom and climbed into bed with her. According to Jennifer Wall, he kissed her, touched her breasts, and put his finger and tongue in her vagina (38a-39a). Prior to the alleged penetrations, she told him that if he was going to rape her, he might as well kill her. He then allegedly put his hands around her neck and started to choke her (40a-41a). At the end of the incident, he allegedly said he would leave her alone if she gave him a big kiss. She testified that after she complied, he left the room (40a-41a). According to Ms. Wall, she then got ready for work, and he drove her to her job at Bob Evans' restaurant (42a-43a).

Ms. Wall testified that she told her manager what had happened to her and that she had to leave. Her boyfriend, Aaron, picked her up and drove her to her friend Kristen Bevard's house (44a). When she arrived at Kristen's house, she told Kristen what happened. Kristen used Jennifer Wall's camera to take pictures of Ms. Wall (44a-45a). She just happened to have the camera with her from the previous night (44a-45a). Afterwards, Kristen drove Ms. Wall to Elizabeth Meyer's house. After she told Liz what had happened, Liz took her to the Belleville Police Station, where she spoke to Corporal Voigt. He photographed her and she subsequently went to St. Joseph's Mercy Hospital (45a-46a). According to Jennifer Wall, she suffered bruises on her back and inner thighs, a handprint on her neck, and broken blood vessels around her eyes (46a). She identified Exhibits 1-4 as photographs of her injuries (46a-51a). Defense counsel's objection to Exhibit 3 was overruled (48a-50a).

On cross-examination, Jennifer Wall testified that she had lived with her mother and Ben Phillips since she was three years old (52a). In 1997, her brother Jackson was born and he was diagnosed with some physical conditions that required subsequent surgery and attention (52a-53a). Up until April 1998, she was attending a parochial school and had a 3.0 grade point average (53a-54a). In the summer of 1998, she and her mother began having serious conflicts about Jennifer's behavior, such as staying out late, lying about her work schedule, being fired from her job, trouble in school including skipping and failing, drug use, having male guests at the house, and taking her mom's credit card (54a-61a, 72a). At the end of October 1998, her mother permanently grounded her (60a).

In November 1998, lived with Stephanie Hunter, Sarah Mullins and her dad, Marvin Wall (61a-62a). In the beginning of November 1998, she wrote a letter to her boyfriend, Aaron; the letter was about her mother and stepfather. She identified Exhibit A as the letter she wrote (62a-

63a). In this letter, she wrote that her mother and Ben were getting divorced, that she was really glad about the divorce, that her mother "smartened up" after Ben hit her across the side of her head and popped her eardrum, and that Ben had yelled at Jennifer and smacked her against her mouth with a coffee cup (63a-64a). In the letter, Jennifer said she was glad Ben was gone because she could get away with everything, have better relations with her mother, "for sure get a car," not get abused, get the phone, and she could stay out. In the letter, she said, "Come on, he is such an asshole." (66a). She subsequently learned that her mother was not divorcing Ben (65a).

While Jennifer was out of the house in November 1998, her friend's mother faxed a complaint to the Belleville Police Department with Jennifer's assistance. In the complaint, she accused Ben Phillips of abusing her (67a-69a). The allegations occurred in August 1998. When she went to the police station with her mother regarding these allegations, her mother told the police that Jennifer needed serious help, and that she was out of control (70a). Her mother also told her that she was untrustworthy (70a). According to Jennifer, her mother persuaded her to come back home because her stepfather got an afternoon job and Jennifer would not have to see him; Jennifer testified that she called the police officer and told him that she was at home, everything was fine, and she was not interested in pursuing the complaint (70a-71a).

At Christmas 1998, she returned the gifts from her family and got the money instead. She claimed she spent the money on shoes, but her mother accused her of spending it on drugs (72a). Her mother then went to Juvenile Court but Jennifer thought her mother went to court to keep her, rather than to file an incorrigibility complaint (72a-73a). However, Jennifer begged and pleaded with her mother to be able to come back home (73a-74a). On January 12, 1999, Jennifer

filed another complaint against Ben Phillips, alleging that he shoved his tongue in her mouth on New Years Eve (74a).

By March 1999, Jennifer had skipped an entire month of school and she had been arrested in Ann Arbor for shoplifting and credit card fraud (75a). At that point, her mother did not want her to come home because she believed that Jennifer was untrustworthy, drinking, abusing drugs, violating curfew, and truant (75a).

In July 1999, there was a trial regarding Jennifer's allegations against Ben Phillips, but Jennifer did not show up (76a). Just prior to the trial, Jennifer had been arrested in Ann Arbor for driving with males who had a loaded gun in the car, had warrants, and were drunk (76a). The Department of Social Services took her to Vista Maria, but she ran away within hours (76a-77a).

Jennifer went to her Dad's house. However, she called her mother and asked to come home because her Dad was using drugs. Jennifer and her mother worked out an agreement that Jennifer would behave appropriately and that if Jennifer did not behave, this would be the very last time. Prior to that, her mother had threatened to have Jennifer picked up as a delinquent juvenile and she filed an incorrigibility petition in Juvenile Court (77a-78a).

In early August 1998, Jennifer made an agreement with her mother and she came home shortly after the court hearing. After Jennifer had been home for five days, she got a job at Bob Evans' restaurant and she had a 10:00 p.m. curfew. The first week was training and her mother picked her up from Bob Evans at 10:00 p.m. During the second week, her mother stopped picking her up because Jennifer called and said she had to stay late and Kristen would bring her home (78a-79a). Jennifer recalled telling her mother that Kristen had been sexually abused and that Jennifer "knew how to take care of things." (79a).

On Friday, August 13, 1999, Jennifer and her mother went to a counseling session, and her mother complained afterwards regarding Jennifer's attitude (80a). On Saturday night, Jennifer was supposed to be working, but went to Kristen's house instead; when Jennifer returned home, the door was locked. When her mother let her in, her mother said, "Get up the stairs, I'm done talking to you. I'm not going to talk to you about it tonight." (81a-83a).

On August 15, 1999, Jennifer was sleeping in the guest room where Ben sometimes slept when he came home late from work (84a). On August 14, Jennifer told her mother and stepfather that she had to be at work by 4:00 and it was agreed that Ben would drive her to work because she did not have a ride (85a). Jennifer could not recall whether her little brother was home or whether he was in the car when her stepfather drove her to work (88a). During the alleged incident, she screamed for 20-30 minutes (86a-87a). She confirmed that Ben choked her (89a).

Kristen Bevard confirmed that she saw Jennifer Wall during the evening of August 14, 1999 and about 3:00 p.m. on August 15, 1999. Ms. Bevard took pictures of her and drove her to Liz's house (91a-94a). Elizabeth Meyer Tinsley confirmed that Jennifer Wall came over on August 15, 1999 about 3:30 p.m. and that Ms. Tinsley transported her to the Belleville Police Department and to the hospital (105a-108a).

Tricia Grzeskowiak, a nurse at St. Joseph Hospital, testified that she assisted in examining Jennifer Wall on August 15, 1999 about 6:00 p.m. She observed reddish-purple spots (petechiae) around her eyelids and under her eyes; she also had reddish-purple marks on her neck, and marks on her back and thigh. She opined that petechiae are the result of pressure causing the blood to come to the surface, and that choking around the neck can cause petechiae (95a-97a). On cross-examination, she testified that the doctor's notations indicated petechiae periorbital (99a). The trial court questioned the nurse about the petechiae, attempting to elicit

information about how long it lasts and whether there are other causes. After defense counsel objected that Ms. Grzeskowiak had not been qualified as an expert, the nurse injected her opinion that petechiae could only be caused from squeezing and from having something tight around the area (101a-102a).

Corporal Kenneth Voigt testified that Jennifer Wall came into the police station on August 15, 1999 about 2:15 p.m. (109a-110a; 125a). She made both an oral and written statement (111a-118a).

The parties stipulated that the lab analysis by Dorothy Martus of the vaginal, rectal and oral swabs did not reveal the presence of seminal fluid or sperm, and that there were no foreign hairs (119a). The parties also stipulated regarding Corporal Taylor's notes of his interview with Ms. Wall and regarding Ms. Wall's November 23, 1998 and January 1999 complaints against Mr. Phillips. The stipulation also included proceedings against Ms. Wall in July 1999 which resulted in her being sent to Vista Maria (120a-123a). After the prosecution rested, defense counsel moved for a directed verdict. The motion was denied (124a-125a).

The defense called Karen Phillips who testified that she has been married to Ben Phillips for eight years and that they lived together for four years (126a). Mrs. Phillips testified that she is employed as a registered nurse at Grace Hospital and that she also does home care (126a-127a). Prior to the birth of their son Jackson in January 1997, Jennifer was a B student who did her homework and was very family oriented. However, when Jennifer learned of the pregnancy, she was angry that her mother was having another child. In 1998, Jennifer began having problems in school and behaviorally. She no longer wanted to attend her parochial school, she began attending the public high school, and she failed all of her final exams. She stayed out all night,

started smoking, started abusing alcohol and drugs, and she lied about her work schedule. She became sexually active and had a boyfriend, Aaron (127a-136a).

In August 1998, Mrs. Phillips confronted Jennifer regarding her curfew; during this confrontation, Jennifer indicated that she had been telling her friends that Ben was abusing her, but her friends didn't believe her because there were no bruises. She also indicated that her friend's father was a police officer and she was going to ask him how Ben could get jail time (137a).

In September 1998, Jennifer was skipping school and she began stealing money from Mrs. Phillips. She couldn't hold a job (138a-139a). In October, she received a progress report indicating that Jennifer was failing every class. She had skipped 25 out of 38 days of school. When Mrs. Phillips came home one evening from the hospital, she found Jennifer home with two males; one was in the house and one was in the driveway (140a-142a). On Halloween, there was a loud confrontation with Ben and Jennifer pushed Mrs. Phillips into the brick side of the house. Jennifer did not come home for a month (143a-144a).

Mrs. Phillips testified that in November 1998, she had treatment for removal of infected ear wax; her husband has never hit her in the ear (145a-147a). Although she and Ben argued about her being too lenient with Jennifer, they never had plans to divorce (147a).

On November 23 or 24, Jennifer came to the house and asked if she could come home. After they made a contract about her behavior, Mrs. Phillips agreed to let Jennifer return home (148a-149a). The police later contacted them about a sexual abuse complaint by Jennifer against Ben that had been faxed in by Farrin's mother. Mrs. Phillips informed the police of Jennifer's alcohol and drug abuse, and Officer Taylor indicated that Social Services would get involved and investigate (150a-152a).

When Jennifer moved back into the house, she observed the rules for the first week. However, she started coming in late, she smelled of smoke, she showed signs of drug use, and she was not attending school (153a-155a). At Christmas, Jennifer returned her gifts and then spent the $600 (156a). On January 12, 1999, Mrs. Phillips put her foot down about Jennifer's behavior, and she then ran away again (157a).

Jennifer came over on the Thursday before Ben Phillips was supposed to go to trial on Jennifer's complaint; she said that she wasn't going to testify (160a-161a). A couple days after the trial, the Sumpter Police called and told Mrs. Phillips to pick up Jennifer. On August 4, Jennifer showed up at Mrs. Phillips' sister's home and asked to come back home, as she didn't like it at Vista Maria. Mrs. Phillips and Jennifer made another contract and Mrs. Phillips allowed Jennifer to come back home; Mrs. Phillips made it clear that this was the final chance (162a-164a). Mrs. Phillips testified that she never had any reason to believe that Ben was sexually abusing Jennifer; if she had believed the allegations, Mrs. Phillips would not have been in the home (165a-166a).

During the second week Jennifer was home, she began to stay late at work and she came home late. After the counseling session on Friday morning, they had a confrontation regarding whether additional counseling was necessary. On Friday evening, Mrs. Phillips allowed Jennifer to go out; however, she came home late and she smelled of smoke. On Saturday, it was agreed that Ben would drive Jennifer to work on Sunday. On Saturday, Jennifer stayed out past curfew. When she arrived home, she smelled of alcohol and smoke, and her hair was messed up. Mrs. Phillips started yelling; she told her to go upstairs, that this was it, and that they would talk about it in the morning. However, Mrs. Phillips left for work at 6:15 a.m. She learned on Monday from Officer Taylor that Jennifer had made allegations against Ben (166a-173a).

Mrs. Phillips gave her opinion that Jennifer was not truthful and that she was manipulative (175a-176a). In answer to defense counsel's question about whether petechiae can be caused by anything other than squeezing, Mrs. Phillips, who was employed as a nurse, testified that "petechiae can be caused by straining like to have a bowel movement, like in labor, excessive coughing bouts, vomiting. My son had it when he vomited." (174a). On cross-examination, Mrs. Phillips denied telling Corporal Voigt that she and Ben were having problems and that she couldn't leave him because Ben was paying the rent. Mrs. Phillips testified that she makes $90,000 a year and that she has no trouble with finances (177a).

Benjamin Phillips testified that on August 15, 1999, he was home taking care of his three-year-old son and Jennifer was sleeping. At 2:00 p.m., he called upstairs to her with instructions to get up and get ready for work. He also went upstairs and told her to get up. When she was ready for work, he drove her to Bob Evans and dropped her off. His son was in the car with them (178a-184a). Mr. Phillips learned later that Jennifer had made sexual abuse allegations against him. After learning of the allegations, Mr. Phillips went to the doctor for an examination. The doctor did not find any marks on his body. Mr. Phillips denied all of the allegations (185a-188a).

Jennifer's maternal grandparents, Alexis and Jerome Ciesla, both testified that they had been very active in Jennifer's life. They were aware of the multiple allegations Jennifer made against Ben Phillips, and they had tried to discuss them with Jennifer. When Mrs. Ciesla asked Jennifer if Ben had raped or attempted to rape her, Jennifer said, "Well, grandma, no, he just was pulling on my halter top and teasing me." (189a-191a; 194a-196a). Mr. and Mrs. Ciesla both gave their opinion that Jennifer was not truthful (192a-193a; 196a).

After the defense rested, the prosecutor called Corporal Voigt as a rebuttal witness. He testified that when he talked to Mrs. Phillips in November 1998, she indicated that she and Mr. Phillips were having problems and that she needed him to help make the house payment (197a).

At the end of his closing argument, the prosecutor asked the trial judge to consider third-degree criminal sexual conduct and assault with intent to commit great bodily harm as lesser included offenses (204a). The trial judge, in her findings of fact and law, found that she did "not believe that the defendant engaged in any type of sexual penetration," and she found that Mr. Phillips was not guilty of the two counts of first-degree criminal sexual conduct. However, the trial judge found that Mr. Phillips was guilty of assault with intent to commit great bodily harm (222a-223a).

The State Appellate Defender Office was appointed on November 9, 2000 to represent Mr. Phillips in his appeal as of right (12a). After appealing as of right, the Court of Appeals affirmed in an unpublished opinion dated May 28, 2002 (Smolenski, P.J., and Neff and White, J.J.)(235a-238a). Mr. Phillips filed an in pro per application for leave to appeal (16a). In an order dated April 16, 2003, this Court directed the prosecutor to file an answer focusing on three issues. (239a). In an order dated July 3, 2003, this Court granted leave to appeal and directed the parties to address the following:

> "Parties are directed to address the retroactivity of People v Cornell, 466 Mich 335, 646 NW2d 127 (2002), and shall also include among the issues to be briefed; whether MCL 767.76 allows the trial court to amend the information after the close of proofs to charge a cognate offense; whether such an amendment after the close of proofs is constitutional in light of Schmuck v United States, 49 US 705, 718, 109 S Ct 1443, 103 L Ed 2d 734 (1989); and if such an amendment after the close of proofs is unconstitutional, whether the error could have been and was harmless." (240a).

SUMMARY OF ARGUMENT

This bench trial involves a prosecutor's informal request, after the close of proofs and at the end of his closing argument, for the trial court to consider third-degree criminal sexual conduct and assault with intent to commit great bodily harm (204a). Defense counsel indicated her disagreement, but did not formally object (204a-205a). Although the trial judge did not announce that she was amending the information, she constructively amended the information and convicted Mr. Phillips of assault with intent to commit great bodily harm (222a-223a).

Pursuant to People v Payne, 90 Mich App 713, 719-721; 282 NW2d 456 (1970), the offense of assault with intent to commit great bodily harm is not a necessarily included lesser offense or a cognate lesser offense of the charged offense of first-degree criminal sexual conduct involving personal injury. Under People v Cornell, 466 Mich 335; 646 NW2d 127 (2002), the trial court was without authority to return this verdict in Mr. Phillips' bench trial. Because Cornell involved a clarification of existing law, it should be given full retroactive effect. Alternatively, even under pre-Cornell case law, the trial court was without authority to return this verdict.

Further, MCL 767.76 does not allow the trial court to constructively amend the information after the close of proofs to add a new offense or a cognate offense. This interpretation is supported by a review of the plain language of MCL 767.76, and by reading MCL 767.76 in conjunction with MCL 768.32(1). In addition, the constructive amendment after the close of proofs is not constitutional in light of Schmuck v United States, 489 US 705, 718; 109 S Ct 1443; 103 L Ed 2d 734 (1989). Mr. Phillips did not receive adequate notice that he would have to defend against a charge of assault with intent to commit great bodily harm, where assault with intent to commit great bodily harm is not a necessarily included lesser offense, or a cognate

lesser included offense of first-degree criminal sexual conduct. US Const, Ams VI, XIV; Const 1963, art 1, §§17, 20.

Assuming that this Court finds defense counsel's "disagreement" with the prosecutor's informal request during closing argument was insufficient to preserve this issue for appeal, the error here was jurisdictional. Further, the error here was so egregious, affecting the substantial right of Mr. Phillips to notice and the opportunity to defend, that it constituted plain error.

The error implicates a constitutional right that is so basic to a fair trial that it can never be treated as harmless. Alternatively, the prosecutor cannot show that the error was harmless beyond a reasonable doubt. Despite defense counsel's cross-examination of the complainant regarding the extent of her injuries, this was insufficient to constitute an adequate defense to assault with intent to commit great bodily harm. Defense counsel made a weak attempt to elicit testimony from Mr. Phillips' wife, who was a nurse, regarding possible other causes of petechiae; however, given Mrs. Phillips' clear alliance with Mr. Phillips, the jury may well have questioned her credibility. Had Mr. Phillips had proper notice of the assault charge, defense counsel could have called unbiased, qualified expert witnesses to testify regarding other possible causes of petechiae. Defense counsel also may have decided to call the complainant's boyfriend and/or fellow employees at the Bob Evans restaurant to testify regarding the complainant's physical appearance at the time she arrived at work.

Finally, if this Court deems that defense counsel's "disagreement" was insufficient to preserve this issue for appeal, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." People v Carines, supra, 763. First, Mr. Phillips is actually innocent. Second, the

error was so egregious, affecting his substantial right to notice and the opportunity to defend, that it constituted plain error. Government of the Virgin Islands v Joseph, supra, 398. The failure to give notice and an opportunity to defend meets all three prongs of the Carines test – it affects the fairness, integrity and public reputation of the judicial proceedings. This constructive amendment at the end of trial implicated such constitutional rights as fair notice, double jeopardy, and the effective assistance of counsel. See Watson v Jago, supra, 338.

I. WHERE ASSAULT WITH INTENT TO COMMIT GREAT BODILY HARM IS NOT A NECESSARILY INCLUDED LESSER OFFENSE OR A COGNATE LESSER OFFENSE OF THE CHARGED OFFENSE OF FIRST-DEGREE CRIMINAL SEXUAL CONDUCT INVOLVING PERSONAL INJURY, THE TRIAL COURT WAS WITHOUT AUTHORITY TO RETURN THIS VERDICT IN DEFENDANT'S BENCH TRIAL; DEFENDANT WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO NOTICE OF THE CHARGE AGAINST HIM AND AN OPPORTUNITY TO DEFEND AGAINST THE CHARGE, WHERE THE TRIAL JUDGE CONSTRUCTIVELY AMENDED THE INFORMATION DURING ITS FINDINGS OF FACT AND LAW AND CONVICTED DEFENDANT OF ASSAULT WITH INTENT TO COMMIT GREAT BODILY HARM.

A. FACTS AND PROCEDURAL HISTORY

Mr. Phillips was charged with two counts of first-degree criminal sexual conduct involving personal injury, MCL 750.520b(1)(f). At the end of the prosecutor's closing argument, the prosecutor asked the trial court to consider "both lesser and cognate offenses" of third-degree criminal sexual conduct and assault with intent to commit great bodily harm (204a). Defense counsel began her closing argument with, "Well, I would disagree with the prosecutor from the start. This is a credibility contest. This is a credibility contest. This Court has to find, beyond a reasonable doubt, that Jennifer Wall is telling the truth in order to convict my client." (204a-205a).

During the trial judge's findings of fact and law, she constructively amended the information and convicted Mr. Phillips of assault with intent to commit great bodily harm. The trial court acquitted Mr. Phillips of both counts of first-degree criminal sexual conduct, but convicted him of assault with intent to commit great bodily harm:

> "Although this Court believes that the defendant entered the guest room, this Court does not believe that the defendant engaged in any type of

> sexual penetration, either finger in vagina or cunnilingus. This Court believes that a fight ensued between Jennifer and the defendant, and the defendant tried to strangle her, causing some bruising and petechiae. This Court finds that the prosecutor has proven, beyond a reasonable doubt, that the defendant tried to physically injure Jennifer Wall, that at the time of the assault the defendant had the ability to cause an injury, or at least believed that he had the ability, and that the defendant intended to cause great bodily harm. Therefore, this Court finds the defendant guilty of assault with intent to do great bodily harm less than murder, and not guilty of the two counts of criminal sexual conduct first degree causing personal injury with which he had been charged." (222a-223a).

The Court of Appeals affirmed Mr. Phillips' conviction. The panel treated the assault conviction as a new offense, which the panel found was a permissible amendment under People v Hunt, 442 Mich 359; 501 NW2d 151 (1993) and People v Fortson, 202 Mich App 13; 507 NW2d 763 (1993). The panel also found that the two charges were "not so dissimilar that defendant was deprived of notice or the opportunity to defend against the charges" and that the defense would not have changed, as Mr. Phillips denied the allegations (235a-238a).

B. STANDARD OF REVIEW

Whether assault with intent to commit great bodily harm is a necessarily included lesser offense or a cognate lesser offense of first-degree criminal sexual conduct is a question of law that this Court reviews de novo. People v Mendoza, 468 Mich 527, 531; 664 NW2d 685 (2003); People v Perry, 460 Mich 55; 594 NW2d 477 (1999). The interpretation of a statute or a court rule is a question of law and subject to de novo review. People v Chavis, 468 Mich 84, 91; 658 NW2d 469 (2003). The issue of whether a defendant's rights to notice and due process were violated is a constitutional question, which this Court reviews de novo. People v Sierb, 456 Mich 519, 522; 581 NW2d 219 (1998).

When the prosecutor informally requested at the end of his closing argument that the trial court consider the "lesser and cognate" offenses of third-degree criminal sexual conduct and assault

with intent to commit great bodily harm, defense counsel indicated her disagreement, but did not formally object (204a). If this Court deems counsel's stated "disagreement" as an inadequate objection, the standard of review is plain error affecting defendant's substantial rights. People v Carines, 460 Mich 750; 597 NW2d 130 (1999).

C. ANALYSIS

1. THE OFFENSE OF ASSAULT WITH INTENT TO DO GREAT BODILY HARM IS NOT A NECESSARILY INCLUDED LESSER OFFENSE OF FIRST-DEGREE CRIMINAL SEXUAL CONDUCT AND UNDER *PEOPLE V CORNELL*, THE TRIAL COURT WAS WITHOUT AUTHORITY TO RETURN THIS VERDICT IN DEFENDANT'S BENCH TRIAL.

In its order granting leave, this Court directed the parties to "address the retroactivity of People v Cornell, 466 Mich 335; 646 NW2d 127 (2002)." (240a). This Court's interpretation of MCL 768.32(1) in Cornell is relevant as this Court now decides how to interpret MCL 767.76.[1] In Cornell, supra, 346, this Court relied on Justice Coleman's dissenting opinion in People v Jones, 395 Mich 379; 236 NW2d 461 (1975), which addressed the blurring of roles and the threats to due process that are inherent in the cognate offense approach, and which are at issue in the case at bar:

> "Justice Coleman dissented from the majority opinion in Jones because she disagreed with the theory of lesser included offenses adopted by the majority. She explained that it would blur the lines of responsibility in the criminal justice process, reasoning:

[1] MCL 768.32(1) and MCL 767.76 are intertwined in the instant case. Whether the trial court's verdict is viewed in the context of an improper instruction in a bench trial under MCL 768.32(1) (see sub-issues C.1. and C.2.), or in the context of an improper constructive amendment under MCL 767.76 and MCR 6.112(H)(see sub-issue C.3.A.), the constitutional concerns are the same (see sub-issue C.3.B.), and the error here is not harmless (see sub-issue C.4.).

> 'The "cognate," "related," or "allied" lesser offense (it is not in reality 'included') theory as here presented conjures up visions of increased rather than diminished confusion.
>
> It invites appeals because of its formlessness. It blurs the roles of prosecutor, judge and defense counsel. If not contrary to our statutes, it adds a new act or section to the existing legislation.
>
> It threatens due process as to defendant and fundamental fairness as to the people in the preparation and presentation of the case.
>
> Unless the tendencies of past history are altered, we can anticipate in some cases a result the opposite of that desired by my colleagues. Considering the number of offenses by our definition "related" or "allied" to this or other major crimes, juries presented with foreseeable smorgasbords of possibilities conceivably will return unjustifiable verdicts of guilty.
>
> In my opinion, the theory adopted today neither promotes the efficient and careful operation of the criminal justice system nor is likely to result in a fairer trial for the defendant.' [Id., 406.]

In explaining the reasons for her disagreement with the majority's theory, Justice Coleman noted that the decision to charge a person with a crime was the prosecutor's responsibility and that the Court had held that courts may not interfere with that process. She explained that after the crime was charged and a trial held, MCL §768.32 permits the jury to consider other offenses. However, the statute did not leave the jury free to convict for any felony or misdemeanor; only degrees or an attempt of the offense charged could be considered. Thus, as Justice Coleman construed the statute, MCL § 768.32 only permits consideration of necessarily included lesser offenses." People v Cornell, supra, 346-347 (emphasis added).

In People v Cornell, supra, this Court explained and enforced the requirements of MCL 768.32(1), which, with some modifications not pertinent to this analysis, has long provided:

> "Except as provided in subsection (2) [concerning certain controlled substance offenses], upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense." (Bracketed material added).

This Court in Cornell recognized that the Legislature correctly controlled what charges the factfinder could consider. People v Cornell, supra, 353. After an extensive review of earlier Michigan law, this Court held that MCL 768.32(1) only permits the consideration of necessarily included lesser offenses "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." Id., at 357. Consideration of cognate lesser offenses is foreclosed. Id., at 354-355. The strictures of MCL 768.32 apply equally to bench trials. Id., at 349 n 5.

"A necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense." People v Mendoza, supra, 540, quoting Cornell, supra, 356. "[T]he defendant's due process notice rights are not violated because all the elements of the lesser offense have already been alleged by charging the defendant with the greater offense." Id. at 354-355, quoting People v Torres (On Remand), 222 Mich App 411, 419-420; 564 NW2d 149 (1997) and People v Membres, 34 Mich App 224, 191 NW2d 66 (1971).

In Counts I and II, Mr. Phillips was charged with two counts of first-degree criminal sexual conduct involving personal injury, MCL 750.520b(1)(f). This statute provides that:

> "A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:
> (i) When the actor overcomes the victim through the actual application of physical force or physical violence.
> (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
> (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion." [MCL 750.520b(1)(f)]

In comparison, the statute describing the offense of assault with intent to cause great bodily harm provides:

> "Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars." [MCL 750.84.]

Because assault with intent to do great bodily harm is not a necessarily included lesser offense of first-degree criminal sexual conduct, this verdict is invalid. As indicated in the above statute, a conviction of first-degree criminal sexual conduct involving personal injury requires the prosecutor to establish sexual penetration caused by force or coercion, and personal injury. MCL 750.520b(1)(f). The term "personal injury" is defined at "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(l). The physical injury need not be permanent or substantial. People v Mackle, 241 Mich App 583, 596; 617 NW2d 339 (2000). In People v Himmelein, 177 Mich App 365, 376-377; 442 NW2d 667 (1989), the Court of Appeals found that bruises, welts and other marks were sufficient, because "evidence of even insubstantial physical injuries is sufficient to support a conviction for criminal sexual conduct in the first degree." First-degree CSC is a general intent crime. People v Brown, 197 Mich 448; 495 NW2d 812 (1992).

By contrast, a conviction of assault with intent to do great bodily harm, MCL 750.84, requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) a specific intent to do great bodily harm less than murder. People v Parcha, 227 Mich App 236, 239; 575 NW2d 316 (1997); People v Mitchell, 149 Mich App 36; 385 NW2d 717 (1986).

The Court of Appeals has specifically found that assault with intent to commit great bodily harm is not a necessarily included lesser offense, or a cognate lesser offense of first-degree criminal sexual conduct (personal injury). People v Payne, 90 Mich App 713, 719-721;

282 NW2d 456 (1979). Cf. Campbell v People, 34 Mich 351 (1876)(Prior to the criminal sexual conduct statutory scheme, Court held that felonious assault is a necessarily included lesser offense of rape.)

The crime of first-degree criminal sexual conduct with personal injury involves a sexual penetration caused by force and coercion and personal injury to the complainant. The crime of assault with intent to do great bodily harm includes the elements of an assault and the specific intent to commit great bodily harm. The crime of assault with intent to do great bodily harm includes the additional element of a specific intent to commit great bodily harm, and does not include sexual penetration. It cannot be said that, "It is impossible to commit the greater offense without first committing the lesser offense." Cornell, supra, 360.

Furthermore, this was an all or nothing case. Mr. Phillips denied all of the allegations by the complainant (185a-188a). Mr. Phillips testified that he called upstairs to the complainant with instructions to get up and get ready for work. He also went upstairs and told her to get up. When she was ready for work, he drove her to the Bob Evans Restaurant where she worked and dropped her off (178a-184a). In Cornell, supra, 357, this Court held that an instruction on a necessarily included lesser offense is only proper where the charged greater offense requires the jury to find a disputed factual element and a rational view of the evidence would support it. In the instant case, the fact finder should have found Mr. Phillips guilty of the charged offense or acquitted him because there was no evidence warranting a different direction, and no circumstances which would lessen the offense.[2] See People v Mendoza, supra, 546-548.

Although in Cornell, this Court said its decision was "given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved," Cornell, supra, 367, the actual issue referred to was the question of the defendant's right to a jury instruction on a necessarily included misdemeanor, and not on the question currently before this

[2] As trial defense counsel indicated, this case involved a credibility contest (204a-205a) and the evidence did not suggest a middle ground. The trial judge may have afforded Mr. Phillips an impermissible "waiver break" for waiving his right to a jury trial. See People v Ellis, 468 Mich 25, 658 NW2d 142 (2003); People v Walker, 461 Mich 908; 603 NW2d 784 (1999).

Court. Cornell made it clear that the statute controlling the consideration of lesser offenses had long been in effect, and the statute is what controls the issue at bar. Id., at 341.

This Court's decision in Cornell should be fully retroactive. In deciding the extent to which a decision announcing a new constitutional rule of criminal procedure should be given retroactive effect, the Court traditionally has weighed three factors. They are " '(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' " Solem v Stumes, 465 US 638, 643; 104 S Ct 1338; 79 L Ed 2d 579 (1984) (quoting Stovall v Denno, 388 US 293, 297; 87 S Ct 1967; 18 L Ed 2d 1199 (1967); see also Linkletter v Walker, 381 US 618, 636; 85 S Ct 1731; 14 L Ed 2d 601 (1965);. People v Doyle, 451 Mich 93, 104; 545 NW2d 627 (1996). The rule in Cornell did not establish a new rule. Rather, it was a reaffirmation and clarification of an existing rule of law first established in 1846. Although this Court's decision in Cornell rejected the cognate offense approach of Ora Jones, it made it clear that the cognate offense approach contradicted MCL 768.32(1) (a version of which had been in existence since 1846) and the construction that the statute had been given by the Court in Hanna v People, 19 Mich 316 (1869). People v Cornell, supra, 341-348. See also People v Reese, 466 Mich 440, 447 fn 9; 647 NW2d 498 (2002). The fact that much of the recent case law disregarded MCL 768.32(1), does not preclude making Cornell fully retroactive. Accordingly, this Court should conclude that Cornell represents a clarification of existing law and is fully retroactive.

Even if this Court confirms its earlier statement in Cornell that the decision is only given limited retroactive effect, Mr. Phillips' case meets those requirements. In Cornell, this Court indicated that Cornell had limited retroactivity to cases where the issue had been preserved and the case was pending on appeal. Cornell, supra, 367. The issue was sufficiently preserved in the trial court by the prosecutor's "request" during closing argument for the trial court to consider

the offense of assault with intent to commit great bodily harm (204a).[3] Furthermore, the issue of whether the trial court sitting as factfinder could amend the information after the close of proofs to add the offense of assault with intent to commit great bodily harm is interrelated to Cornell and was adequately raised in Mr. Phillips' brief on appeal and was pending in the Court of Appeals at the time of this Court's decision in Cornell.

Because this Court's decision in Cornell does not allow a verdict of an offense that is not necessarily included, Mr. Phillips' conviction for assault with intent to do great bodily harm must be vacated.

2. ASSUMING ARGUENDO THAT *PEOPLE V CORNELL* DOES NOT APPLY RETROACTIVELY TO DEFENDANT PHILLIPS' CASE, ASSAULT WITH INTENT TO COMMIT GREAT BODILY HARM IS NOT A COGNATE LESSER OFFENSE OF FIRST-DEGREE CRIMINAL SEXUAL CONDUCT, AND THE TRIAL COURT WAS WITHOUT AUTHORITY TO RETURN THIS VERDICT.

Assuming arguendo that Cornell does not apply retroactively to Mr. Phillips' case, even **under the pre-Cornell line of cases**, the trial court was without authority to return a verdict of guilty of assault with intent to commit great bodily harm, as it was not a cognate lesser offense of first-degree criminal sexual conduct.

A trial court has no authority to convict a defendant of an offense not specifically charged, unless the defendant has had adequate notice. People v Adams, 389 Mich 222; 205 NW2d 415 (1973); People v Quinn, 136 Mich App 145, 147; 356 NW2d 10 (1984); People v Carter, 415 Mich 558, 583-584; 330 NW2d 314 (1982). There are no fair notice problems

[3] Although defense counsel failed to formally object, defense counsel indicated that she "disagreed with the prosecutor from the start." (204a). Even if not deemed a formal objection,

presented where the lesser offense is one "necessarily included" within the greater. People v Ora Jones, 395 Mich 379, 418; 236 NW2d 461 (1975). The problems may arise, however, where the lesser offense is a cognate lesser offense rather than a necessarily included one. Id. A trial court may not instruct a jury on a cognate lesser offense unless the language of the charging document gives the defendant notice that he could face a lesser offense charge. People v Chamblis, 395 Mich 408, 418; 236 NW2d 473 (1975), *modified in part* People v Stephens, 416 Mich 252; 330 NW2d 675 (1982); People v Quinn, supra. The same is true concerning offenses which the court may consider when it sits as the trier of fact at a bench trial. People v Cazal, 412 Mich 680; 316 NW2d 705 (1982); People v Quinn, supra, 148.

The trial court may consider cognate lesser offenses *not requested by the defense* only if no notice problem is created, and if the lesser offense is supported by the evidence. People v Stubbs, 110 Mich App 287, 289; 312 NW2d 232 (1981); People v King 98 Mich App 146, 153; 296 NW2d 211 (1980).[4] There are situations in which instructions on a cognate lesser offense violate a defendant's right to be adequately apprised of the charges against which he must defend. People v Chamblis, supra, 418.

In People v Esz, unpublished opinion per curiam of the Court of Appeals, decided June 22, 2001 (Docket No. 213424)(241a-242a), the Court addressed a situation similar to the instant case. The defendant was charged with second-degree home invasion. At the conclusion of the bench trial, the trial court convicted the defendant of receiving and concealing stolen property in excess of $100 on its own accord. The Court reversed, stating the following:

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the prosecutor's request is sufficient to preserve the issue for appeal.

[4] Where a defendant requests that the jury be instructed with respect to a cognate lesser offense, the issue of notice is waived. People v McKinley, 168 Mich App 496, 506-508 425 NW2d 460 (1988).

> "Defendant was not afforded notice that he could face a lesser offense conviction in the charging document, Adams, supra at 389 [People v Adams, 202 Mich App 385; 509 NW2d 530 (1993)], nor was he informed of this possibility by the trial court or counsel throughout the trial. Moreover, defendant was deprived of an opportunity to present evidence during trial or alter his theory of the case pertaining to that offense. Under these circumstances, defendant could not possibly have known that he would be called upon to defend a charge that was not raised until the verdict was announced. Therefore, we conclude that defendant did not receive adequate notice that he would have to defend against a receiving and concealing stolen property charge, Adams, supra at 391, and we reverse defendant's conviction." People v Esz, supra (242a).

See also People v Adams, 202 Mich App 385; 509 NW2d 530 (1993).

In People v Payne, supra, 719-721, the Court of Appeals held that assault with intent to commit great bodily harm is not a necessarily lesser included offense or a cognate lesser included offense of first-degree criminal sexual conduct involving personal injury. This Court should adopt the following reasoning of Payne, supra, 720-721:

> "Except for having certain elements in common with criminal sexual conduct, assault with intent to do great bodily harm less than murder meets none of the requirements for a lesser included offense. Criminal sexual conduct is a distinct type of assaultive offense. The Legislature has gone to great lengths to carve out sexual assaults from other types of assaults. Society views sexual assaults as particularly heinous and the Legislature has determined punishments for the various types of criminal sexual conduct. There is a specific 'assault' crime associated with criminal sexual conduct. With this statutory backdrop, we find that assault with intent to do great bodily harm less than murder is a different type of offense than and protects a different societal interest than criminal sexual conduct, and hence it is not a lesser offense of criminal sexual conduct.
>
> It is highly doubtful that when defendant was charged with sexual offenses he was fairly placed on notice to defend against general assault charges."

The Court in Payne, supra, 721 fn 7, noted that "it was within the prosecutor's discretion to charge defendant with the assault charge itself. Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 682-683, 194 NW2d 693 (1972)."

In People v Harris, 133 Mich App 646, 651; 350 NW2d 305 (1984), the Court of Appeals rejected the argument that felonious assault was a lesser included offense of first-degree criminal sexual conduct (while armed with a weapon) because "the two offenses do not serve a common statutory purpose but serve to remedy two distinct problems." Cf. People v Ellis, 174 Mich App 139; 436 NW2d 383 (1988)(Court found that felonious assault was a cognate offense of first-degree CSC where prosecutor's theory was accomplished by use of a weapon).

In People v Corbiere, 220 Mich App 260; 559 NW2d 666 (1997), the Court of Appeals addressed whether domestic assault was a cognate lesser offense of third-degree criminal sexual conduct. After reviewing Harris and Payne, the Court concluded that domestic assault was not a cognate lesser offense third-degree criminal sexual conduct. The Court reiterated that "the societal interests furthered by the criminal sexual conduct statutes are distinct from the interests associated with statutes criminalizing assaults in general." Id.at 265. The Court stated that criminal sexual conduct statutes were enacted to strengthen laws proscribing certain kinds of sexual conduct, contrasted with assault statutes designed to address general contact among individuals and preserve safety and security by protecting people against corporeal harm. Id. at 264. The Court in Corbiere, supra, 265-266, stated:

> "In enacting criminal sexual conduct statutes, the Legislature chose not to have sexual misconduct prosecuted under the general assault statutes or to identify criminal sexual conduct as a heightened degree of assault. Instead, the Legislature devised a comprehensive statutory scheme harshly penalizing limited and specifically defined forms of sexual conduct. In fact, the Legislative history reveals that the Legislature intentionally changed the name of the crime from 'sexual assault' to 'criminal sexual conduct' so that the established legal definition for 'assault' would not impede criminal sexual conduct prosecutions. See Legislative Service Bureau Bill Analysis, House Substitute for Senate Bill No. 1207, July 12, 1974, Memorandum, Analysis of House Substitute SB 1207, from Don P. LeDuc, Office of Criminal Justice Programs, Department of Management and Budget, to Governor William G. Milliken, July 9, 1974. In our view, this history reveals a Legislative intent to make criminal sexual conduct a uniquely heinous

crime that is distinct from and far more invasive of human sanctity and dignity than common assault."

Mr. Phillips was charged with two counts of first-degree criminal sexual conduct involving personal injury. He had no notice that he must defend against being convicted of the unrelated offense of assault with intent to commit great bodily harm. Assault with intent to commit great bodily harm offense is not a cognate lesser offense of the first-degree criminal sexual conduct charges such that he can be assumed to have notice. Assault with intent to commit great bodily harm does not bear a sufficient relationship to the principal charge, is not in the same class or category, and does not protect the same societal interests. People v Payne, supra. This Court should vacate Mr. Phillips' conviction for assault with intent to commit great bodily harm.

3. WHETHER MCL 767.76 AND MCR 6.112(H) ALLOW THE TRIAL COURT TO AMEND THE INFORMATION AFTER THE CLOSE OF PROOFS

In this Court's order granting leave, this Court also directed the parties to address "whether MCL 767.76 allows the trial court to amend the information after the close of proofs to charge a cognate offense; whether such an amendment after the close of proofs is constitutional in light of Schmuck v United States, 49 US 705, 718, 109 S Ct 1443, 103 L Ed 2d 734 (1989); and if such an amendment after the close of proofs is unconstitutional, whether the error could have been and was harmless." (240a).

In the present case, if one views the prosecutor's request during closing argument as a motion to amend the information to allow an alternative charge of assault with intent to commit great bodily harm, see People v Perry, supra, 64 fn 19, the trial court's "grant" of the motion was reversible error under MCL 767.76 and MCR 6.112(H). In essence, the trial court "constructively

amended" the charging document to charge a new offense,[5] without notice and without an opportunity to defend against that offense. This is the quintessential example of a case in which the constructive amendment of the information at the end of trial caused both prejudice to Mr. Phillips as well as a failure of justice in violation of his state and federal constitutional rights to notice of the charges against him and an opportunity to defend. US Const, Ams VI, XIV; Mich Const 1963, art 1, §§17, 20. Mr. Phillips had proceeded through two days of trial — conducting jury selection, presenting an opening argument, and conducting cross-examination — with a focus upon defending the allegation that he engaged in sexual penetration with force and coercion, resulting in personal injury. Then, on the last day of trial, the trial court essentially permitted the prosecution to add the scenario that he physically assaulted the complainant with the specific intent to commit great bodily harm.

A) MCL 767.76 AND MCR 6.112(H)

Pursuant to MCL 767.45(1), an indictment or information must state the nature of the offense in language which will fairly apprise the accused and the court of the offense charged.[6] "'An information must be specific for two reasons: it affords the defendant due notice of the charges against him and protection against double jeopardy should he be retried.'" People v Traughber, 432 Mich 208, 215; 439 NW2d 231 (1989), quoting People v Covington, 132 Mich App 79, 88; 346 NW2d 903 (1984)(Maher, J., concurring); Watson v Jago, 558 F2d 330 (CA 6, 1977).

[5] As noted in sub-issues C.1. and C.2., supra, assault with intent to commit great bodily harm is not a necessarily lesser included offense or a cognate lesser offense of first-degree criminal sexual conduct. Furthermore, although it is less than clear, the Court of Appeals below appeared to find that the trial court is allowed to amend the information to add a new charge (236a-238a).

Michigan law permits a trial court to amend an information.[7] MCL 767.76, MCR 6.112(H). MCL 767.76 in relevant part, as follows:

> "The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefore no writ of error other appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted."

MCR 6.112(H)[8] provides that "the court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant."

MCL 767.76 provides for amendments "in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." MCL 767.76. With respect to timing, MCL 767.76 allows for an amendment "before, during or after the trial." The statute also provides

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[6] The test for sufficiency of an information is as follows: "Does it identify the charge against the defendant so that his conviction or acquittal will bar a subsequent charge for the same offense; does it notify him of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and to permit the court to pronounce judgment according to the right of the case?" People v Adams, 389 Mich 222, 243 205 NW2d 415 (1973).

[7] Although MCL 767.76 refers to indictments, unless specifically noted otherwise, all laws applying to prosecutions on indictments also apply to prosecutions by information. MCR 6.112(A); MCL 750.10; MCL 767.2.

[8] Effective October 3, 2000, the rule was re-lettered from MCR 6.112(G) to MCR 6.112(H). 463 Mich clviii.

that if the amendment is "made to the substance of the indictment or to cure a variance between the indictment and the proof," the defendant may request a discharge of the jury or a reasonable continuance "unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made..."

MCL 767.76 speaks of a range of amendments – from correcting a mere "defect," to an amendment "to the substance" of an indictment, to the most serious amendment which is to "cure a variance." In the context of amending an indictment, the Sixth Circuit in United States v Solorio, 337 F3d 580 (CA 6, 2003), addressed the difference between a variance, an amendment, and a constructive amendment:

> "'A variance [to the indictment]" occurs when the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. In contrast, an amendment involves a change, whether literal or in effect, in the terms of the indictment.' United States v Chilingirian, 280 F3d 704, 711 (6th Cir 2002)(quotations omitted). 'This Court has held that a variance rises to the level of a constructive amendment when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.' Id. at 712 (quotation omitted). Although the distinction between a variance and a constructive amendment has been called 'sketchy,' we have noted that the 'consequences of each are significantly different.' Id. 'A variance will not constitute reversible error unless "substantial rights" of the defendant have been affected,' while a constructive amendment is per se prejudicial. Id. (citation omitted)." United States v Solorio, supra, 589-590.

In light of the accepted definitions of the terms variance and amendment, the plain language of MCL 767.76 suggests that the framers of MCL 767.76 intended the statute to cover those situations in which there has been some minor factual or technical variance between the charge and

the proof, but did not intend to allow an amendment that changed the nature of the charged offense.[9] Reading MCL 767.76 in conjunction with MCL 768.32(1), it is evident that the framers did not intend to eviscerate the type of notice contemplated by the Sixth Amendment.[10] Even assuming arguendo that MCL 767.76 is subject to two possible interpretations, a statute is to be construed where fairly possible so as to avoid substantial constitutional questions. People v Tombs, ___ Mich App ___; ___ NW2d ___; 2003 WL 23104196 (2003). In accordance with this principle, this Court should reject any interpretation of MCL 767.76 that allows the state to change the nature of the charged offense by adding a new or cognate offense at the end of trial.

(1) REGARDING ADDING A NEW OFFENSE[11]

In People v Sims, 257 Mich 478, 481; 241 NW 247 (1932), the Court interpreted MCL 767.76 as follows:

> "The statute does not authorize the court to permit the changing of the offense nor the making of a new charge by way of amendment, as feared by counsel for defendant. It permits only cure of defects in the statement of the offense which is already sufficiently charged to fairly apprise the accused and court of its nature. Being thus procedural, it does not violate article 2, § 19, of the Constitution, which provides that the accused shall have the right to be informed of the nature of the accusation. People v Meyer, 204 Mich 331, 169 NW 889. There being no new or different charge introduced by amendment, there is no occasion for a new examination or a rearraignment." People v Sims, supra, 481-482.

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[9] When interpreting a statute, the goal is to ascertain and give effect to the intent of the Legislature. This Court begins by reviewing the plain language of the statute. If the language is clear and unambiguous, no further construction is necessary. People v Chavis, 468 Mich 84, 92 658 NW2d 469 (2003).

[10] A defendant's Sixth Amendment right to notice is relevant to amending the information and to permissible lesser included offense instructions. United States v Solorio, supra, 590.

[11] Mr. Phillips realizes that this Court's order granting leave asked the parties to address whether the information can be amended to add a cognate offense (240a). However, because assault with intent to commit great bodily harm is not a necessarily included lesser offense or a cognate offense (see sub-issue C.1. and C.2., supra) and because the Court of Appeals below found that the information could be amended to add a new offense, Mr. Phillips must also address whether a new offense can be added to the information by amendment.

The Court of Appeals has also held that a new offense cannot be added to an information by a motion to amend at the close of proofs. People v Price, 126 Mich App 647, 652; 337 NW2d 614 (1983); People v Willett, 110 Mich App 337, 343; 313 NW2d 117 (1981), remanded on other grounds, 414 Mich 970; 327 NW2d 71 (1982).

In People v Hunt, 442 Mich 359, 364; 501 NW2d 151 (1993), this Court found no unfair surprise, inadequate notice, or insufficient opportunity to defend existed when the prosecutor moved **at the end of the preliminary examination** to amend the information to charge third-degree criminal sexual conduct instead of gross indecency between males. The prosecutor explained that she had had not been aware of the penetration before the preliminary examination because the investigative report only described sexual contact. Id., 154. See also People v Fortson, 202 Mich App 13, 15-17; 507 NW2d 763 (1993)(where the Court of Appeals, relying on Hunt, allowed the amendment of the information to add a new charge of felony firearm four months after the preliminary examination and **five months before trial**).

In People v Goecke, 457 Mich 442, 458; 579 NW2d 868 (1998), this Court held that MCR 6.112(G) authorized the trial court to review the magistrate's bindover decision upon the prosecutor's motion to amend the information.[12] In Goecke, the defendant was charged with OUIL causing death and second-degree murder. At the preliminary examination, the magistrate refused to bind the defendant over on the charge of second-degree murder, and instead bound the defendant over on OUIL causing death. In the trial court, presumably in advance of trial, the prosecutor moved to amend the information to reinstate the second-degree murder charge. The motion was granted. This Court concluded that the circuit court had jurisdiction and that the "only legal obstacle to amending the information to reinstate the second-degree murder charge was whether the

amendment would cause undue prejudice to the defendant because of '"unfair surprise, inadequate notice, or insufficient opportunity to defend."' Id. at 462. This Court held that "[w]here a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial..." Id.

The Court of Appeals in Mr. Phillips' case incorrectly found that MCL 767.76 and MCR 6.112(H) allow the trial court to amend the information to add a new charge in the instant case after the close of proofs (236a-237a). Although the prosecution could have charged Mr. Phillips with assault with intent to commit great bodily harm, or moved to amend the information well in advance of trial to add this new offense, People v Hunt, supra, 364, the prosecution did not do so.[13] Even during trial, the prosecution here did not formally move to amend the information. Rather, the "request to amend" came at the end of the prosecutor's closing argument in the form of an informal request that the trial court consider the offenses of assault with intent to commit great bodily harm and third-degree criminal sexual conduct (204a). This "request" to add a new offense after the close of proofs caused undue prejudice because of unfair surprise, inadequate notice, and an insufficient opportunity to defend.[14] Because the constructive amendment was after the close of proofs, Mr. Phillips had no opportunity to adjust his trial strategy to include the added offense. This Court should hold that MCL 767.76 and MCR 6.112(H) do not permit the information to be amended to add a new offense after the close of proofs. The rule of Hunt and Fortson should not be stretched to

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[12] In Goecke, this Court found it unnecessary to find the court rule inconsistent with the statute. This Court did note that as a rule of procedure, the court rule superseded the statute. People v Goecke, supra, 460 and n 18, citing MCR 6.001(E).

[13] As the Court noted in People v Willett, 110 Mich App 337, 344 313 NW2d 117 (1981), "Prosecutors should take care in drafting their complaints to avoid the need for later amendment absent surprise developments at trial." See also People v Payne, supra, 721 fn 7.

encompass the situation at hand, as it would eviscerate a defendant's right to notice and to defend the charges brought against him.

(2) REGARDING ADDING A COGNATE LESSER OFFENSE

As set forth in sub-issue C.1. and C.2., supra, assault with intent to commit great bodily harm is not a cognate offense of first-degree CSC. However, assuming arguendo that assault with intent to commit great bodily harm is a cognate lesser offense of first-degree criminal sexual conduct (personal injury), the trial court cannot add a cognate offense after the close of proofs at trial without obliterating a defendant's constitutional right to notice.

In People v Gibbons, 260 Mich 96; 244 NW 244 (1932), the defendant was charged with attempt to rape and ravish. At trial, prior to the introduction of evidence, the prosecutor was allowed to amend the information to charge assault with intent to commit rape. The Court interpreted MCL 767.76 to preclude the prosecution from amending the information to add the "similar" offense:

> "While the statute, being part of Code of Criminal Procedure of 1927, was adopted to eliminate some of the technicalities which have surrounded the practice of criminal law, it does not permit the amendment of an information after trial has been begun so as to charge the accused with a different crime, punishable with a more severe penalty. There is no proper information charging defendant with the crime of assault with intent to commit rape." Id. at 99.

In People v Adams, 202 Mich App 385; 509 NW2d 530 (1993), during the course of trial, the prosecutor requested that the trial court instruct the jury on an uncharged cognate lesser offense of receiving and concealing stolen property, where the defendant had only been charged with breaking and entering a building with intent to commit a larceny. The Court of Appeals considered

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[14] In Hunt, supra, 364, this Court listed these factors disjunctively and indicated that these factors were relevant to the defendant's right to a fair opportunity to meet the charges against him. In Mr. Phillips' case, he has suffered all three.

this to be an effective amendment of the information and concluded that the amendment of the information prejudiced the defendant because it came after the proofs were closed and the defense had no opportunity to adjust its defense strategy. The Court stated:

> "We conclude that where, as here, the charged offense and the offense sought to be added are dissimilar in their elements, such late notice of the prosecutor's intent to seek an instruction on the lesser offense is inadequate. Where offenses are dissimilar, with the focus being on different factual elements, the defendant may well prepare his defense, including the cross-examination of prosecution witnesses, in an entirely different manner for the lesser offense than he would for the greater offense. However, once the trial is completed, or even nearly completed, it is difficult, if not impossible, for the defendant to adjust his trial strategy to encompass the newly added offense. Had the prosecutor notified defendant before the opening of proofs that he would also seek an instruction on receiving and concealing stolen property, that may well have been entirely adequate notice to allow the trial court to grant a request for such an instruction, particularly if the trial court were generous in granting any request by defense counsel for a continuance to allow for any additional preparation necessary for the changed character of the trial to come. In the case at bar, however, that notice simply came too late.
>
> In sum, we conclude that where a prosecutor seeks to add a cognate lesser included offense that is dissimilar to the charged offense, and the information does not suggest the need to prepare a defense against that cognate lesser included offense, and notice to the defendant does not come until after the prosecutor begins to present evidence, the trial court should not grant the prosecutor's request for an instruction on that cognate lesser included offense. Under those circumstances, the notice to the defendant is not adequate. Accordingly, we conclude that in the case at bar the trial court erred in granting the prosecutor's request for an instruction on the cognate lesser included offense of receiving or concealing stolen property." People v Adams, supra, 391-392.

In the habeas case of Gray v Raines, 662 F2d 569 (CA 9, 1981), the Ninth Circuit addressed the substitution of an offense with different elements than the offense actually charged. The defendant was charged with first-degree (forcible) rape where the age of victim was irrelevant and consent was a defense. Near the end of trial, the prosecution sought an instruction on statutory rape, where the victim's age was relevant and consent was unavailable as a defense. The Ninth Circuit vacated the statutory rape conviction, noting that although both types of rape were included in the

Arizona rape statute, each offense was distinct with different elements and the state was obligated to comply with the Sixth Amendment notice requirement. Id. at 572. See also Government of the Virgin Islands v Joseph, supra, 396-398.

The trial prosecutor's request for consideration of assault with intent to commit great bodily harm came after the close of proofs and was simply too late. Mr. Phillips had no notice, as even if it is a cognate lesser offense, it is dissimilar to the charged offense of first-degree CSC and the information did not suggest the need to prepare a defense to assault with intent to commit great bodily harm. Where the request is made after the close of proofs, this Court should hold that MCL 767.76 and MCR 6.112(H) do not allow the trial court to amend the information to add a cognate lesser offense.

B) WHETHER AN AMENDMENT OF THE INFORMATION AFTER THE CLOSE OF PROOFS IS CONSTITUTIONAL IN LIGHT OF SCHMUCK V UNITED STATES

In this Court's order granting leave to appeal in the instant case, this Court directed the parties to brief whether an amendment of the information after the close of proofs is constitutional in light of Schmuck v United States, 489 US 705; 109 S Ct 1443; 103 L Ed 2d 734 (1989) (240a).

Under both the state and federal constitution, a defendant has the right to be informed of the nature of the accusation. The right to be apprised with specificity of the accusation charged is a fundamental element of due process. US Const, Ams VI, XIV; Const 1963, art 1, §§17, 20. The Sixth Amendment guarantees a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges in order to permit adequate preparation of a defense. Sheppard v Rees, 909 F2d 1234, 1236 (CA 9, 1990). The notice provision of the Sixth

Amendment is incorporated within the Due Process Clause of the Fourteenth Amendment and is fully applicable to the states. See Gray v Raines, supra, 571-572. "'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence.'" People v Darden, 230 Mich App 597, 600; 585 NW2d 27 (1998), quoting In re Oliver, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948). It is a violation of due process to convict a defendant of a crime not charged. Cole v Arkansas, 333 US 196; 68 S Ct 514; 92 L Ed 644 (1948). Likewise, a defendant cannot be held to answer a charge not contained in the indictment brought against him. See Stirone v United States, 361 US 212, 215-217; 80 S Ct 270; 4 L Ed 2d 252 (1960). A defendant's due process right to notice of the charges brought against him allows him to adequately prepare his defense, and to protect a defendant from subsequent prosecution for the same conduct. People v Traughber, supra, 215.

In the federal system, where there is a Fifth Amendment right to a grand jury, the rule is that after an indictment has been returned, the charges may not be broadened through amendment except by the grand jury itself. Stirone v United States, 361 US at 215-16. Therefore, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." It has further been held that "a constructive amendment of the indictment is a reversible error per se if there has been a modification at trial of the elements of the crime charged." United States v Salinas, 601 F2d 1279, 1290 (CA 5, 1979). However, The Fifth Amendment's guarantee of a grand jury indictment in cases of capital crimes, however, has never been incorporated into the Fourteenth Amendment and therefore is not applicable to the states. Watson v Jago, supra, 337.

Further, the Federal Rules of Criminal Procedure provide "Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding." Fed.R.Crim.P. 7(e).

Federal courts have found that an amendment of a state information can raise constitutional Fourteenth Amendment due process and Sixth Amendment notice problems sufficient to call for habeas corpus review. Every accused has the right to be informed of the nature and cause of the accusations filed against him. US Const, Ams VI, XIV; Const 1963, art 1 §17; Watson v Jago, supra, 338.

In Koontz v Glossa, 731 F2d 365 (CA 6, 1984), the defendant was originally charged with having committed an aggravated arson. He filed a notice of alibi. Three days before trial, the state moved to amend the charge to a different section of the same statute to charge "arson for hire." The Sixth Circuit found a denial of due process in amending the charge, noting that three days was an insufficient amount of time to allow the defendant to prepare an adequate defense to the added charge.

In Tague v Richards, 3 F3d 1133, 1141 (CA 7, 1993), the Court noted that a "'last-minute change in the charge could prejudice a defendant's opportunity to defend himself; if that prejudice is severe enough, a due process violation could occur.'" The Court concluded the resolution of the question depends on whether the defense was adequately apprised of the new allegation and had time to prepare. See also Wright v Lockhart, 854 F2d 309, 312 (CA 8, 1988). Obviously, a constructive amendment to an information after the close of the proofs is the most telling example of inadequate time to prepare to defend different charges.

In Hunter v New Mexico, 916 F2d 595 (CA 10, 1990), the Tenth Circuit granted habeas corpus relief in a criminal sexual conduct case where the jury instructions constituted a constructive amendment of the information by allowing the jury to convict on a theory of guilt different from that specified in the charging document.

In another habeas case, Lucas v O'Dea, 179 F3d 412, 416-417 (CA 6, 1999), the petitioner was charged with intentional murder. The jury was instructed, however, that "it is immaterial which one of them fired the shot that killed Paul Zurla." The Sixth Circuit granted habeas relief, as the trial court's jury instructions constituted a constructive amendment of the indictment that deprived petitioner of his Fourteenth Amendment right to notice of the charges against him. The Sixth Circuit found that petitioner was exposed to charges for which he had no notice and thus no opportunity to plan a defense. Id. at 417. The Sixth Circuit also found that trial counsel was ineffective in failing to object. Id. at 418-419. The Court declined to decide whether the federal system's per se prejudicial principle regarding constructive amendments was applicable to habeas corpus cases. Id. at 419.

The United States Supreme Court's decision in Schmuck v United States, supra, is also instructive on this issue. In Schmuck, the petitioner was charged with multiple counts of mail fraud. He moved under FRCP 31(c) for a lesser included offense instruction on the crime of tampering with an odometer. In resolving a conflict amongst the Circuits[15] over which test to apply in determining what constitutes a lesser included offense for the purposes of FRCP 31(c),[16] the Supreme Court rejected the fact-based, inherent relationship analysis and specifically adopted the traditional elements approach. 489 US 716-717. The Court set forth three reasons for adopting the elements approach. The first reason involved a defendant's Constitutional right to notice:

> "It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him. See Ex parte Bain, 121 US 1, 10, 7 S Ct 781, 786, 30 L

[15] Compare United States v Whitaker, 144 US App DC 344, 349 447 F2d 314, 319 (1971)(inherent relationship test), and United States v Campbell, 652 F2d 760, 761-762 (CA 8, 1981).

[16] FRCP 31(c) provides in relevant part: "The defendant may be found guilty of an offense necessarily included in the offense charged."

Ed 849 (1887); Stirone v United States, 361 US 212, 215-217, 80 S Ct 270, 272-273, 4 L Ed 2d 252 (1960); United States v Miller, 471 US 130, 140, 142-143, 105 S Ct 1811, 1817, 1818-1819, 85 L Ed 2d 99 (1985). This stricture is based at least in part on the right of the defendant to notice of the charge brought against him. United States v Whitaker, 144 U.S. App D.C., at 350-351, 447 F2d, at 320-321. Were the prosecutor able to request an instruction on an offense whose elements were not charged in the indictment, this right to notice would be placed in jeopardy. Specifically, if, as mandated under the inherent relationship approach, the determination whether the offenses are sufficiently related to permit an instruction is delayed until all the evidence is developed at trial, the defendant may not have constitutionally sufficient notice to support a lesser included offense instruction requested by the prosecutor if the elements of that lesser offense are not part of the indictment. Accordingly, under the inherent relationship approach, the defendant, by in effect waiving his right to notice, may obtain a lesser offense instruction in circumstances where the constitutional restraint of notice to the defendant would prevent the prosecutor from seeking an identical instruction. The elements test, in contrast, permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge. This approach preserves the mutuality implicit in the language of Rule 31(c)." Schmuck v United States, 489 US at 717-718 (footnote omitted).

The second reason was that the history of Rule 31(c) supported the adoption of the elements approach, and the third reason was based on the ability to apply the test:

"Third, the elements test is far more certain and predictable in its application than the inherent relationship approach. Because the elements approach involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial, the elements approach permits both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly. The objective elements approach, moreover, promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of inference. The inherent relationship approach, in contrast, is rife with the potential for confusion. Finding an inherent relationship between offenses requires a determination that the offenses protect the same interests and that "in general" proof of the lesser "necessarily" involves proof of the greater. In the present case, the Court of Appeals appropriately noted: "These new layers of analysis add to the uncertainty of the propriety of an instruction in a particular case: not only are there more issues to be resolved, but correct resolution involves questions of degree and judgment, with the attendant

> probability that the trial and appellate courts may differ." 840 F2d at 389-390. This uncertainty was illustrated here. The three judges of the original appellate panel split in their application of the inherent relationship test to the offenses of mail fraud and odometer tampering. 776 F2d at 1373-1375 (opinion concurring in part and dissenting in part). In the context of rules of criminal procedure, where certainty and predictability are desired, we prefer the clearer standard for applying Rule 31(c)." Schmuck v United States, 489 US at 720-721.

In People v Madden, unpublished opinion of the Colorado Court of Appeals, decided August 14, 2003 (Docket No. 02CA0024), 2003 WL 21939695 (243a-248a), the Colorado Court of Appeals held that the use of an instruction defining a variety of third degree sexual assault that was different from the charged offense was an improper constructive amendment after the close of the evidence. (245a-246a). The Court relied on Schmuck:

> "It is unconstitutional to require a defendant to answer a charge not contained in the charging instrument. Schmuck v United States, 489 US 705, 717; 109 S Ct 1443, 1451; 103 L Ed 2d 734 (1989)('It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him.'); see also People v Rodriguez, 914 P2d 230 (Colo 1996).
>
> Accordingly, variances between the crime charged and the crime instructed upon or convicted of that change an essential element of the charged offense and alter the substance of the charging instrument are considered unconstitutional constructive amendments to the information. People v Rodriguez, supra; see also Crim. P. 7(e) (information may only be amended as to substance 'at any time prior to trial')." People v Madden, supra (246a).
> This Court's decision in Cornell brings Michigan's jurisprudence in line with Schmuck.[17]

In Cornell, this Court clarified that MCL 768.32(1) only permits the consideration of necessarily included lesser offenses "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." Cornell, supra, 357-358. Instructions on cognate lesser offenses are foreclosed. Id. at

354. This Court also made it clear that the strictures of MCL 768.32(1) apply equally to bench trials. Cornell at 349, n 5. This Court now needs to bring Michigan's jurisprudence regarding amending the information in line with Schmuck. This Court should clarify that MCL 767.76 only permits the trial court to amend the information after the close of proofs to add a necessarily included lesser offense.

Mr. Phillips' case is the quintessential example of a case in which the constructive amendment of the information at the end of the trial, after the close of proofs, caused both prejudice to Mr. Phillips, as well as a failure of justice in violation of his state and federal constitutional rights to due process and to be apprised of the charges against him. US Const, Ams VI, XIV; Mich Const 1963, art 1, §§17, 20. Mr. Phillips had proceeded through the entire two-day trial with a focus upon defending the allegations that the incident constituted first-degree criminal sexual conduct. Then, at the end of the trial, the prosecutor during closing argument asked the trial judge to consider the lesser offenses of third-degree CSC and assault with intent to commit great bodily harm (204a). During her findings of fact and law, the trial judge constructively amended the information and convicted Mr. Phillips of assault with intent to commit great bodily harm. The trial court's constructive amendment of the information allowed the trial court to convict Mr. Phillips of a charge different from that which was charged in the information. He did not have adequate notice that it would be alleged, after the parties had rested, that he assaulted Jennifer Walls with the intent to commit great bodily harm. Prior to the constructive amendment, he was seeking to convince the trial court that he did not commit first-degree criminal sexual conduct. After the constructive amendment, he was also facing the

[17] As this Court noted in Cornell, 466 Mich 356 fn 9, "[w]hile MCL 768.32 does not use the same phrasing as F.R. Crim. P. 31(c), which refers to 'an offense necessarily included in the offense charge,' as we have already explained, the wording of MCL §768.32 also limits consideration of lesser offenses to necessarily included lesser offenses."

allegation that he committed assault with intent to commit great bodily harm. He was thus left to rely on a defense that had only been designed to counter first-degree criminal sexual conduct. Because the offenses of first-degree criminal sexual conduct and assault with intent to commit great bodily harm are not of the same class or category and are designed to protect different societal interests, the addition of this additional charge resulted in unfair surprise. This unfair surprise and inadequate notice deprived Mr. Phillips of his state and federal constitutional due process rights to be apprised of the charges, and to present a defense. Mr. Phillips was unfairly surprised and prejudiced by this change in the information after the close of proofs. See sub-issue C.4., infra.

Mr. Phillips recognizes that his trial attorney did not object to the prosecutor's suggestion during closing argument (other than to state her disagreement) and did not object to the trial court's constructive amendment of the information when the trial court rendered its verdict. However, this is a jurisdictional defect that can be raised at any time. Although a defect in an information ordinarily cannot be raised for the first time on appeal, the Court of Appeals has held that where the amendment seriously prejudiced a defendant's right to due process, a defendant is entitled to reversal:

> "The trial court erred by amending the information. The defendant, however, did not object to the amendment and, ordinarily, a defect in an information cannot be raised for the first time on appeal, see MCL 767.76; MSA 28.1016. Nevertheless, the amendment seriously prejudiced defendant's right to due process. If the information had been amended before trial, the defendant may have been able to prepare a defense to the added offense. But it was amended at trial after both parties had rested. Defendant was thus left to rely on a defense to receiving and concealing stolen property that had been designed to counter only the breaking and entering charge. This lack of notice denied the defendant his right to due process of law. In addition, a jurisdictional defect such as the one present in this case may be raised at any time. People v Cherry, 27 Mich App 672, 675; 183 NW2d 857 (1970). For the above reasons, the defendant is entitled to a reversal." People v Price, supra, 655.

Finally, if defense counsel's failure to object during the trial court's findings of fact and law precludes appellate review, the error here was so egregious, affecting the substantial constitutional rights of Mr. Phillips to notice and the opportunity to defend, that it constituted plain error. Government of the Virgin Islands v Joseph, 765 F2d 394, 398 (CA 3, 1985). Alternatively, defense counsel was ineffective in failing to object. See Issue II, infra. His conviction must be reversed.

4. WHERE THE AMENDMENT AFTER THE CLOSE OF PROOFS WAS UNCONSTITUTIONAL, THE ERROR WAS EITHER PREJUDICIAL PER SE, OR NOT HARMLESS BEYOND A REASONABLE DOUBT.

In this Court's order granting leave, the parties were directed to address: "if such an amendment after the close of proofs is unconstitutional, whether the error could have been and was harmless." (240a).

The error here was a structural error not subject to harmless error analysis. Harmless error analysis applies only to trial errors and not to structural defects. Because structural defects infect the entire trial process, they defy harmless error analysis. Consequently, structural defects require automatic reversal. Brecht v Abrahamson, 507 US 619; 113 S Ct 1710; 123 L Ed 2d 353 (1993); Arizona v Fulminante, 499 US 279, 306-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991); People v Anderson (After Remand), 446 Mich 392, 405-406; 521 NW2d 538 (1994); People v Mitchell, 454 Mich 145, 153-155; 560 NW2d 600 (1997); People v Duncan, 462 Mich 47, 51-52; 610 NW2d 551 (2000). This Court has defined a structural constitutional error as one that constitutes a defect in the constitution of the trial mechanism itself rather than an error in the conduct of the trial, which is amenable to harmless-error analysis in light of the quantum and strength of the untainted evidence. People v Anderson (After Remand), supra, 406-406 (citing Fulminante, supra, 307-308 and Chapman, supra, 23).

Many constitutional errors can be harmless, but where the amendment actually modified the offense charged and deprived the defendant of his right to notice and the opportunity to defend in violation of the Sixth and Fourteenth Amendments, the error is structural, requiring automatic reversal. See Hunter v New Mexico, supra, 599.

In State v Sanders, 68 P3d 434, 446 (Arizona App Div 1, 2003), the Court found that an amendment during trial that changed the nature of the charged offense was prejudicial per se. In reaching this conclusion, the Court noted the following "practical underpinning to the reversible per se rule":

> "The existence of prejudice in a given case generally must be determined from a review of the proceedings in which the conviction was obtained. However, when a trial commences with one charge and that charge is thereafter amended to change the nature of the offense, the record of that trial is useless as a tool to determine whether a defendant was prejudiced by the amendment.
>
> To illustrate, if a defendant's counsel is notified that his client faces a certain charge, he prepares for trial on that charge with the result that his opening statement, his cross-examination of the state's witnesses, his presentation of his client's case, and all other efforts are targeted at the elements contained in the charged offense. He justifiably neglects to prepare for or pursue inquiry into matters that are irrelevant to those elements, even though evidence of such matters might arise during trial and event though the evidence might constitute another crime.
>
> When the state is nevertheless permitted to amend in order to charge this other crime, the resulting conviction cannot be justified on the basis that there is evidence in the record to support the amended charge, and that defendant was therefore not prejudiced by the amendment. Such an approach overlooks the fact that the trial record is irrevocably tainted because we can never know from that record whether the evidence of the amended charge could have withstood a well-prepared cross-examination, a different justification defense, or any other of the many testing devices inherent in our adversarial process. 'The constitutional requirement of a fair trial is not satisfied merely by the existence in the record of sufficient evidence to establish guilt. To apply such a test as dispositive would be to ignore other mandatory components of a fair trial, and would defeat the purpose of the notice requirement.' Sheppard, 909 F2d at 1238." State v Sanders, supra, 441.

See also People v Madden, supra (246a)("A constructive amendment after completion of the evidence is per se reversible error."); People v Foster, 971 P2d 1082, 1087 (Colo App 1998)("A variance that broadens an indictment constitutes a constructive amendment and is reversible per se."). In Lucas v O'Dea, supra, 419, the Court declined to decide whether the federal system's per se prejudicial principle regarding constructive amendments was applicable to habeas corpus cases.

Assuming that this Court does not find that the error is reversible per se and assuming that this Court deems defense counsel's "disagreement" with the prosecutor's request as a sufficient objection, Mr. Phillips submits that because the constructive amendment after the close of proofs was unconstitutional, the beneficiary of the error cannot show that it was harmless beyond a reasonable doubt. People v Anderson (After Remand), supra, 405-406. Mr. Phillips denied the complainant's allegations, and the Court of Appeals below concluded that this defense was applicable to both charges. The Court of Appeals also noted that Mrs. Phillips testified the complainant was untrustworthy and untruthful, and that defense counsel extensively questioned the complainant about the incident and her injuries (238a). Despite these efforts by defense counsel with regard to the first-degree CSC charges, they were insufficient to constitute an adequate defense to assault with intent to commit great bodily harm. Defense counsel made a weak attempt to elicit testimony from Mr. Phillips' wife, who was a nurse, regarding possible other causes of petechiae (174a); however, given Mrs. Phillips' clear alliance with Mr. Phillips, the jury may well have questioned her credibility. Had Mr. Phillips had proper notice of the assault charge, defense counsel could have called unbiased, qualified expert witnesses to testify regarding other possible causes of petechiae. Defense counsel also may have decided to call the complainant's boyfriend and/or fellow employees at the Bob Evans restaurant to testify regarding the complainant's physical appearance at the time she arrived at work. Further, as the Court noted in United States v Dhinsa, 243 F3d 635, 668 (CA 2, 2001), the appellate court cannot and should not speculate whether the defendant would have chosen a different trial

strategy had he been aware that the government intended to charge him with the additional offense.

Finally, if this Court deems that defense counsel's "disagreement" was insufficient to preserve this issue for appeal, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." People v Carines, supra, 763. First, Mr. Phillips is actually innocent. Second, the error was so egregious, affecting his substantial right to notice and the opportunity to defend, that it constituted plain error. Government of the Virgin Islands v Joseph, supra, 398. The failure to give notice and an opportunity to defend meets all three prongs of the Carines test – it affects the fairness, integrity and public reputation of the judicial proceedings. This constructive amendment at the end of trial implicated such constitutional rights as fair notice, double jeopardy, and the effective assistance of counsel. See Watson v Jago, supra, 338.

Furthermore, it is fundamentally unfair to allow the trial prosecutor and the trial judge to ambush Mr. Phillips in this manner. The trial prosecutor here failed to charge assault with intent to commit great bodily harm, failed to file a motion to amend prior to trial, and when he did make the request during his closing argument it was informally and in the guise of a request for consideration of a lesser offense, with no notice to defense counsel and with no claim of surprise. See People v Hunt, supra, 154; People v Willett, supra, 344. In addition, the trial judge failed to announce that she was formally amending the information; rather, she simply announced her findings and verdict of guilt. Despite these multiple omissions by the trial prosecutor and the trial judge, it is Mr. Phillips who is made to suffer under Carines. Perhaps if the trial prosecutor had filed a formal motion to amend prior to trial or even at the beginning of trial, and/or the trial judge had announced that she was formally amending the information after the close of proofs, defense counsel would have objected. For all these reasons, Mr. Phillips has met the plain error test and is entitled to have his conviction for assault with intent to commit great bodily harm reversed.

D. CONCLUSION

In interpreting the parameters of MCL 767.76, this Court should adopt the clear standard of Cornell and Schmuck and hold that an information can only be amended after the close of proofs to add necessarily included lesser offenses. This approach will avoid the concerns raised by Justice Coleman in Ora Jones -- the "smorgasbords of possibilities," the threats to due process and fundamental fairness, and the blurring of roles -- and instead, will satisfy the notice requirements of the Sixth Amendment and provide certainty and predictability. Furthermore, as a matter of policy, prosecutors and trial judges should not be permitted to constructively amend the information after the close of proofs, without formal notice and without any allegation of surprise by the proofs. Where the information is constructively amended after the close of proofs to add a new offense, this Court should find that it is per se prejudicial.

II. DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. STANDARD OF REVIEW

Questions of constitutional law are reviewed de novo. People v LeBlanc, 465 Mich 575, 579; 640 NW2d 246 (2002). Although Mr. Phillips' in pro per Application for Leave to Appeal does not specifically list a Strickland claim,[18] this issue was raised and addressed in the Court of Appeals below in undersigned counsel's brief on appeal, and thus this Court has the benefit of the Court of Appeals' analysis. See People v Crawl, 401 Mich 1, 31; 257 NW2d 86 (1977).

B. ANALYSIS

The accused's right to counsel encompasses the right to the "effective" assistance of counsel. US Const, Ams VI, XIV; Const 1963, art 1, § 20; Powell v Alabama, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932). In Strickland v Washington, 466 US 668, 698; 105 S Ct 2052; 80 L Ed 2d 674 (1984), the Court set forth the two-part test for determining whether the performance of counsel is constitutionally deficient. First, a defendant must show that counsel's errors were so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. Id. at 687. Second, a defendant asserting an ineffective assistance of counsel claim must generally show that defense counsel's deficient performance prejudiced the defense. Id. at 691-692. To show "prejudice" under Strickland, the defendant must show that "there is a reasonable probability that, but for counsel's

[18] Conceivably Issue V of Mr. Phillips' in pro per Application for Leave to Appeal, framed as "For the possible technical/procedural errors made during trial," is broad enough to include a Strickland claim.

unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also People v Pickens, 446 Mich 298, 311; 521 NW2d 797 (1994).

In Lucas v O'Dea, 179 F3d 412 (CA 6, 1999), the Sixth Circuit found ineffective assistance of counsel, where trial counsel failed to object to the trial court's constructive amendment of the indictment:

> "As the district court noted, the failure of Lucas's counsel to object to the jury instructions in question rendered his defense -- that he did not shoot Zurla -- meaningless. When deciding cases arising within the federal court system, this court has held that constructive amendments to an indictment are per se prejudicial, warranting reversal. See Ford, 872 F2d at 1235. We need not decide whether this per se principle is applicable to the habeas corpus review of cases arising from state courts, however, because we conclude that the instruction in the present case had the effect of directing a verdict of 'guilty' on the murder charge. In light of the failure of Lucas's attorney to address the fact that the constructive amendment was constitutionally impermissible, we find that (1) his performance fell below the level of competence required by Strickland, and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' Strickland, 466 US at 694, 104 S Ct 2052." Lucas v O'Dea, 179 F3d at 419.

Similarly, in Mr. Phillips' case, defense counsel's failure to object to the prosecutor's request for consideration of assault with intent to commit great bodily harm and the trial court's constructive amendment of the information as constitutionally impermissible rendered her performance deficient. Further, trial counsel failed to object to the trial court finding Mr. Phillips guilty of an offense that was not a necessarily included lesser offense or a cognate lesser offense. Counsel's failure to object rendered Mr. Phillips' defense meaningless and resulted in the conviction of an innocent defendant. This cannot be deemed a legitimate trial strategy. People v Dalessandro, 165 Mich App 569; 419 NW2d 609 (1988). There is no conceivable reason why a defense attorney would not have jumped up and objected when the trial court found Mr. Phillips not guilty of the first-degree CSC charges, but then proceeded to find him guilty of an offense not charged in the

information and which was not a necessarily included lesser offense or a cognate lesser offense. Further, there is a reasonable probability that but for counsel's failure to object, the result of the proceeding would have been different.

Because the record is clear, and there is no possible trial strategy to justify counsel's above failure, review is possible without an evidentiary hearing. People v Cicotte, 133 Mich App 630; 349 NW2d 167 (1984); People v Johnson, 124 Mich App 80; 333 NW2d 585 (1983). Nonetheless, if the Court feels that an additional record is required, Mr. Phillips hereby moves to remand to the trial court, pursuant to People v Ginther, 390 Mich 436, 442-43; 212 NW2d 922 (1973).

Mr. Phillips' conviction must be reversed.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse his conviction.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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